ing that the defendants are entitled to any reasonable doubt that may remain in your minds, remember as well that if no doubt remains, the [4102] Government is entitled to a verdict.

Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

Your verdict must be unanimous.

When you retire to your jury room to deliberate, you will select one of your number as foreman and he will sign your verdict for you.

In the form of verdict which will now be submitted to you, you will find the names of the five defendants. After each defendant's name are seven blank lines, one for each count of the indictment. You must find each defendant guilty or not guilty as to each count of the indictment and enter your verdict accordingly on the blank lines provided for that purpose. [4103]

The jury will now retire to deliberate upon its verdict.

Mr. Clark and Miss Hileman may remain seated.

(The jury retired at 10:27 a.m. to deliberate upon its verdict.)

The Court (To the alternate jurors): Before you leave, I desire to give you my thanks for your patience and your kindness during the trial. You will go now to the clerk's office and he will make arrangements for your compensation so you won't have to return. You will be excused. Thank you.

Mr. Faulkner: Before the alternate jurors leave —should they be dismissed now?

Mr. Pratt: Certainly.

The Court: I don't see any reason why not.

Mr. Faulkner: I remember when we tried a case before Judge St. Sure he kept the alternate jurors apart until there was actually a determination.

The Court: I am excusing them. The jury is in there deliberating.

Mr. Faulkner: I don't see any reason——

Mr. Pratt: No. I think you Honor is right.

The Court: Here is the language. I have a very efficient clerk.

> "The alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider the verdict."

A. That is on page 27. [4104]

Mr. Faulkner: That is quite clear, your Honor. I don't think there was any clarity before in these rules.

The Court: Well, you had something to do with the rules.—I think you are attracted by them.

Mr. Faulkner: In connection, your Honor, with the matter of the instructions, it appears that the court, with counsel on both sides present——

The Court: One moment. Bring in Mr. Powers and Mr. Malley.

(The deputy U. S. marshal and the bailiff appeared before the court.)

The Court: Mr. Powers and Mr. Malley, you will be sworn now to take charge of the jury.

(The two officers were sworn by the clerk to take charge of the jury.)

The Court: Do your duty, gentlemen. Now, you may proceed.

Mr. Faulkner: In connection with the instructions given by the court, I think the state of the record at this time will be accurately stated as follows: Prior to the retirement of the jury and in the chambers of the court counsel for defendants and counsel for the Government went over the proposed charge of the court to the jury on two separate occasions and all of the instructions given by the court at the request of the prosecution and all of the instructions proposed by [4105] the defendants and not given by the court were gone into with particularity. It appears now that there was not a court reporter present at those hearings and it is my understanding that——

The Court: According to the rules?

Mr. Faulkner: Pardon me?

The Court: According to the rules?

Mr. Faulkner: Yes; not that the rules require the court reporter, but we did comply with the rules in substance and effect, but it is not recorded in the record, and I understand that it is agreeable with the court and counsel for the Government that each defendant is entitled to a full exception in respect to all instructions proposed by the Government and given by the court and a full and complete exception to the failure of the court to give give each and every instruction proposed by the defendants which was not given, and in re-

spect to some of the charge given by the court which it itself prepared on various subjects, such as accomplices and that other offenses are admissible to show intent; in other words, those two matters were likewise fully covered in the discussions with the court, and it is my understanding that we have a full and complete exception to the charge as given, with the exception of that part thereof which consists of instructions proposed by the defendants.

Mr. Pratt: The Government has no objection whatever [4106] to the matter as suggested by Mr. Faulkner.

Mr. Faulkner: Is that an accurate statement, your Honor?

The Court: Very well. As I indicated when we adjourned last evening, in discussing these instructions I asked Mr. Pratt, since you were concerned with whether there was some question about the rules, whether or not you should be at liberty to take exceptions on any legal ground in relation to the instructions, and I indicated to you that as far as I was concerned I had no doubt, and Mr. Pratt acquiesced, so if there is any legal point you wish to urge you are at liberty to do so.

Mr. Faulkner: I don't want to repeat the arguments made in the Judge's chambers.

The Court: I just want to indicate for the purpose of the record that you will have the full cooperation of the court, this may go to the circuit court, to assert any legal right that you have in this record in relation to the evidence and the instructions, or both.

Mr. Faulkner: I just wanted to be clear that we had discussed, argued back and forth all of these instructions. The court determined upon them in chambers and gave them, and it was the intention of all parties that the rules would be complied with in the discussions in chambers, where there was no court reporter, if we should try in the future to recapture something that occurred in the past.

The Court: The court will be in recess. [4107]

(At 11:55 a.m. court convened in the absence of the jury.)

The Court: The jurors have made a request for the exhibits. Have you examined them?

Mr. Faulkner: We haven't yet. We will start right now.

The Court: Well, get the exhibits that are available.

The Clerk: They only want the ones in the folders, that is all they asked for.

Mr. Houck: Some of them, of course, are not in evidence.

Mr. Faulkner: That is what we have to go through.

The Court: You will have to separate those.

The Clerk: It will take about fifteen minutes, your Honor.

Mr. Faulkner: I don't think your Honor will have to remain.

(At 11:57 a.m. a recess was taken, and at 5:10 p.m. court reconvened in the absence of the jury.)

The Court: I have received a note from the jury asking for certain testimony.

Mr. Faulkner: I thought, your Honor, we ought to agree on how we are going to handle this matter. In other words, the exhibits are not in evidence. He testified to these facts on direct examination and he testified relating to those gradings on cross-examination. In other words, if your Honor is disposed to permit any part of it to be read to them it would all have to be read to them on the subject they inquired about. [4108]

Mr. Pratt: Well, we have marked on this piece of paper the pages of the transcript where Major Evans discusses—where he starts his testimony as to certain ships and then a few pages later he gives his grading, and so it is on each of the ships. We have a notation of the pages of the record as to each. Now, I have not gone into the direct examination and I don't know what the suggestion is as far as the cross-examination, whether you go into it.

Mr. Faulkner: I think on any of the ships and on any of the general subject-matter of the Army accepting eggs if the deliveries are a grade less than those specified in the orders and the practice of the Army that went into each ship; there was a lot of testimony relating to his qualifications that would not enter into it, and that I don't think should be read, because they did not ask for it.

The Court: Well, I will ask them when they come in.

Mr. Hippeli: The testimony covers three volumes, your Honor.

Mr. Pratt: It does not cover all of three volumes.

The Court: Well, I will inquire from the jury.

Mr. Pratt: It would not require reading 175 pages, but it would be a substantial number of pages.

The Court: Whatever you agree on on both sides, if you can agree. If you want the 175 pages read it will be necessary to read them. [4109]

Mr. Faulkner: I did not hear what your Honor said.

The Court: Read it.

(The record was read by the reporter.)

Mr. Faulkner: It is pretty hard for the defense to pick out in this short period everything that would be germain to the question propounded by the jury.

The Court: Very well. Bring the jury in.

Mr. Faulkner: But we can pick it out while the direct examination is being read.

(The jury returned into court at 5:15 p.m.)

The Court: Waive the roll call, stipulating and agreeing the jurors are present. The jury sent in a message in relation to Major Evans' egg-grading certificates. Those are in here and they are marked for the purpose of identification. Is it the wish of the jury to have that testimony read, or portions of it?

Foreman Barton: Yes, your Honor. I think that a question has arisen in the minds of some on it and they wish to compare that with the egg-gradings of a later date on board ship.

The Court: Is there any portion of that testimony that has any relation to the request of the jurors that is available?

Mr. Faulkner: May I have that?

(The record was read by the reporter.) [4110]

Foreman Barton: The difference, your Honor, on the Department of Agriculture inspection and the inspection by Major Evans on board ship.

Mr. Faulkner: That would require reading to the jury the testimony of——

The Court: Locate it so that the reporter may read it.

Mr. Faulkner: Mr. Sullivan calls my attention to the fact that the egg-grading certificates came first and I assume what the jury wants is to compare the egg-grading certificates with the later examination aboard the vessel.

Foreman Barton: That is right.

Mr. Pratt: If the Court please, Major Evans' testimony in regard to the steamship Cape Charles is on page 2418, about one-third below the top of page 2418.

Foreman Barton: I think, your Honor, one will be enough if we know the date and the result of the grading.

Mr. Pratt: That would be from page 2418 to 2427, the middle of the page, and that concludes the testimony in relation to the grading of the eggs on the examination of the steamship Cape Charles.

The Court: Mr. Reporter, did you make a note of that?

The Reporter: Yes, your Honor.

The Court: With the consent of both sides, I will have the reporter read the testimony.

Mr. Faulkner: Then we have the cross-examination on the [4111] same subject.

The Court: If you wish any portion that you think has relation to the ship you may follow with it.

Mr. Faulkner: Would that be limited to the ship, or would we be limited——

The Court: The request of the jury is one ship. Was that your request?

Foreman Barton: Yes, I think that is it, your Honor.

The Court: That is what they asked for, so I will ask the reporter to read that. You can then check your record and make any request.

(The following excerpts of the testimony of Major Evans were then read to the jury by the reporter:)

From the Direct Examination:

"Mr. Pratt: Q. May I have Exhibit 94? How many cases of eggs did you find on the deck of the Cape Charles on that occasion?

A. We found and counted 36 cases.

Q. And of these 36 cases did you observe a label on them, a stamp on them?

A. Yes. They bore the Nye & Nissen Biddy brand of egg, a green label, 'Mediums,' and a portion of them there was a Department of Agriculture inspection stamp.

Q. On how many of them was there a Department of Agriculture inspection stamp?

A. 32 of them.

Q. On the other four cases what was the label?

A. It was the same label, but with no inspection label. [4112]

Q. Where did you examine these eggs or candle them, if you did that?

A. On this vessel the eggs were on deck, as I said, and right adjacent to them was a little deck house, apparently an electrical control room with a bunch of electrical switches and fuses and the like, and which had no windows in it, and I candled them in that little room with the doors closed.

Q. Did you have a candling light, an electric candling light, with you?

A. I did. I had the standard Army candling light.

Q. You set it up in this little deck house?

A. Yes. The elecfrician fixed up a connection for my light.

Q. How many cases of these eggs did you examine or candle? A. Four.

Q. The first of these cases that you examined, did it contain an inspection stamp, Department of Agriculture inspection stamp, or not?

A. It did not.

Q. Many eggs in that case did you examine or candle? A. There was 100.

Q. With what result?

A. By grade, you mean?

Q. Yes. What was the result of your examination by candling of these 100 eggs in the first case that you examined?

A. I found 41 percent U.S. Grade AA, 35 percent U.S. Grade A, 16 percent U.S. Grade B, 2 percent Grade C, 2 percent Small Blood Spots, 3 Checks, 3 percent Checks, and one inedible egg.

Q. Out of the hundred? A. Yes.

Q. How did that case of eggs grade, from your examination by candling?

A. You mean the consumer grade?

Q. Yes.

A. Well, it could not be given a consumer grade on the basis of the one inedible egg being present in the hundred that I candled.

Q. Eliminating consideration of the fact that there was one inedible egg out of these hundred, what consumer grade did you give those eggs on your examination?

A. It would have been a Grade B, slightly under Grade A.

Q. Grade B? A. Yes.

Q. Did you weigh the eggs in that case?

A. I did.

Q. How did you do that?

A. By removing the eggs contained in the flats and fillers of a half of the case and weighing the quantity in the half case, and we find out what that case weighed by multiplying that weight by two, to get both sides of the case. I then deducted 3½ pounds from that figure, which is the weight of the flats and fillers in a full case of eggs.

Q. So what did you find the net weight of that case of eggs to be?

A. By that method I determined the weight of 34 pounds 14 ounces.

Q. What did that case of eggs classify as to size?

A. That would barely put it within the classification of U. S. Small. [4114]

Q. You said that this case was labeled with a green label and the word 'Medium'? A. Yes.

Q. Was there any other indication on the label of the grade of the eggs?

A. Not on this case, no.

Q. Did that case classify as Medium?

A. No, sir.

Q. Then the weight, the shortage of weight, would that forbid it being classified as Medium?

A. That would be five pounds two ounces short of the weight required for U.S. Medium.

Q. That is, the net weight? A. Yes.

Q. How many other cases did you examine?

A. Three.

Q. Referring to the second case that you examined, on that case was that a stamped case with the Department of Agriculture stamp?

A. No, it did not bear any inspection stamp.

Q. What did you determine in candling eggs in that case? A. You want percentages?

Q. Yes. How many eggs did you examine?

A. 100 eggs.

Q. With what result?

A. I found 14 percent Grade AA, 36 percent Grade A, 35 percent Grade B, 12 percent Grade C, and 3 inedible eggs.

Q. Why were they inedible?

A. They were mixed rots.

Q. How did these eggs grade?

A. They could not be given a Consumer grade due to the presence of the inedible eggs.

Q. There were 3 percent inedible?

A. Yes. [4115]

Q. Eliminating the consideration of the fact that there were inedibles in the case, how would it grade?

A. Well, it would— They would grade U. S. Consumer Grade B.

Q. Did you weigh this case of eggs?

A. We did.

Q. Did you weigh the case in the same manner as you did the first one? A. Exactly.

Q. By taking the eggs out of half the case?

A. Yes.

Q. Then multiplying the net result by 2?

A. Yes.

Q. And what did you find the weight of the eggs, the net weight of the eggs in that case?

A. 33 pounds 4 ounces.

Q. How would the eggs in that case classify?

A. There is no provision under the Department of Agriculture Consumer grades of eggs for eggs of that weight. In other words, there is not a designation or a class of eggs.

Q. That is below the minimum weight allowed under Government regulation?

A. For the classification of Small.

Q. What is the classification for an egg of that weight?

A. They are generally referred to as 'Peewees.'

Q. The label on that particular case you spoke of was a green medium egg label, is that right?

A. Yes.

Q. The next case that you examined on the Cape Charles, was that a stamped or an unstamped case?

A. It did not bear an inspection stamp.

Q. And a label?

A. It had the same label, 'Biddy Eggs.' [4116]

Q. The green label? A. Yes.

Q. What was the result of your candling of that case?

A. I found 44 percent Grade AA, 33 percent Grade A, 18 percent Grade B, 3 percent Grade C, and 2 Checks.

Q. What did the eggs in that case grade as a whole?

A. They would still grade a Grade B; it is slightly under Grade A.

Q. B? A. Yes.

Q. What was the weight?

Q. Major Evans, just before the court adjourned for the noon recess I had asked you the result of your candling the third of the cases of eggs which you examined on the steamship Cape Charles. I think that you stated, did you not, the result of that candling? A. Yes.

Q. Did you weigh that case of eggs?

A. Yes, sir.

Q. What was the net weight which you found in that connection?

A. 33 pounds 10 ounces.

Q. How would eggs of that weight classify as to size?

A. As I say, there is no classification for that weight of eggs under the promulgations of standards by the Department of Agriculture, but they are refered to as 'Peewees' in the trade.

Q. They are below the minimum weight for eggs provided by the Department of Agriculture?

A. Yes, the Consumer grades of eggs. [4117]

Q. Now, the fourth of these cases that you examined, did that contain a Department of Agriculture Inspection stamp?

A. Yes, sir, it did.

Q. What was the date on that inspection stamp?

A. April 27, 1944.

Q. You examined the eggs on April 29th?

A. Yes.

Q. What did you find with regard to the eggs in that case from your candling?

A. There were 73 percent Grade AA eggs, 21 percent Grade A, 4 percent Grade B, 1 small blood spot, 1 percent Check.

Q. How did those eggs grade?

A. They would grade A, slightly under Grade AA.

Q. Slightly under Grade AA? A. Yes.

Q. The other cases, you said that altogether there were 36 cases of eggs, is that right?

A. Yes.

Q. The total of the 36 case graded how?

A. On the basis of these samples they would have graded, considering the fact they contained inedibles which made no grade for them, they would have been a small Grade B.

Q. There was another case of eggs which you did not candle, but which you weighed, was there?

A. Yes.

Q. Was that case stamped with the Department of Agriculture stamp? A. Yes, sir.

Q. Dated what?

A. The same date, April 27th.

Q. Were all the cases that had a stamp on, were those stamps dated April 27th?

A. They all had the same [4118] date.

Q. What was the result of your weighing of this stamped case, the forth case which you examined?

A. It weighed 40 pounds 4 ounces.

Q. That would classify as far as weight was concerned, as what?

A. As a Medium.

Q. As Mediums. A. Yes.

Q. On this same ship, the Cape Charles, was there any cheese?

A. There was some cheese. I don't know just how much.

Q. Was that on the deck with the eggs?

A. Not as I recall. As I recall, the cheese, one of the agents brought me a piece of cheese to grade as such.

Q. As to quality? A. Yes.

Q. Did you have anything to do with the weighing of the cheese? A. I did not.

Q. Does this conclude your examination of the eggs that were on the Cape Charles on the occasion you have described? A. Yes, sir."

Mr. Pratt: If the Court please, in another phase on Page 2477 there is less than a page of a sort of resume by Major Evans of his inspection on the steamship Cape Charles, Page 2477. [4119]

Mr. Faulkner: Yes, I have it.

Mr. Pratt: This follows about one-third from the top., Line 8 on Page 2477; from there to Line 6 on 2478, exactly one page; that seems to be right on exactly the same connection.

Mr. Faulkner: That is all right, your Honor.

The Court: Very well.

(The reporter read as follows:)

"Q. Going back to the Cape Charles, will you state the date of the Department of Agriculture stamp that appeared on such cases as bore that stamp?

* * * *

"The Witness: The date of the Department of Agriculture Inspection stamp was 27 day of April, 1944.

"Q. That applied to all the cases that were stamped? A. Yes.

"Q. Will you give the total number of eggs and the average as to each grade?

"A. 172 Grade AA, 83 percent; 125 Grade A, 31.2 percent; 73 Grade B, 18.2 percent; Grade C, 4.2 percent; 3 small Bloodspots, .75 percent; 6 Checks, 1.5 percent; 4 Inedible eggs, 1 percent.

"Q. Aside from the inedible eggs, what was the grade of the lot? A. Grade B, Small.

"Q. And the average weight of the eggs, the cases? A. 36 pounds, 1 ounce."

Mr. Pratt: After the cross-examination which is to be read, there was redirect on the subject of the Cape [4126] Charles which I would like to have read.

The Court: Indicate what page.

Mr. Pratt: The redirect is on page 2588 beginning at line 19, and it extends from there to page 2594, it extends to the end of page 2593. I think this should be read after the cross-examination, that is, the redirect examination.

The Court: Indicate for the purpose of the record the portion of the testimony you wish read.

Mr. Faulkner: Yes, your Honor. I won't indicate it all at the same time, your Honor, because I want to get the pages. Starting on page 2523 is the reference to the Cape Charles. There will be more, your Honor, but starting on page 2528.

The Court: Read the cross-examination and the redirect examination.

Mr. Faulkner: And recross-examination at page 2601.

(Excerpts from the cross-examination of Major Evans were read by the reporter, as follows:)

"Q. Major, on or about the 29th of April, 1944, you made an inspection of certain cases of eggs on board the Cape Charles; is that correct?

A. Yes, sir.

Q. Among the cases that you inspected at that time was—rather, of the four cases that you inspected, three were not stamped with the Department of Agriculture stamp?

A. That is correct.

Q. One was stamped with a Department of Agriculture stamp, [4121] which was AA?

A. Correct.

Q. The result of your inspection and candling of those eggs was that there were 73 AA eggs and 21 A eggs, is that correct?

A. Of that one case.

Q. On that one case, which was the only stamped case which you inspected?

A. That is correct.

Q. That made a total of 94 Grade A eggs?

A. Grade A or better.

Q. Pardon me? A. Grade A or better.

Q. Grade A or better? A. Yes.

Q. Under the practice followed by the Army at that time, if is true, is it not, that if those eggs had been graded AA at the point of origin they would have been accepted at the point of delivery if they qualified as A eggs?

A. If it was stipulated in the contract permitting the dropping of grades.

Q. Wasn't that the usual provision of the contracts at that time?

A. That is true in regard to quality, but weight it was not. It is an under-weight grade.

Q. The subject matter of weights, in other words.

as far as quality is concerned, leaving out the subject of weights, that stamped case of eggs would have been accepted in fulfillment of a contract to supply AA eggs?

A. Providing the contract permitted a drop in grade. Not all of them did. [4122]

Q. In respect to the weight of that particular case of eggs, did you weigh the flats and fillers?

A. They were included in the weight of the half case.

Q. Did you weigh them separately?

A. In this specific case I don't remember. We did on several occasions remove the eggs and weigh flats and fillers to satisfy the question in the minds of some bystanders as to how much the tare weighed.

Q. Isn't it a fact that the general weight on an average of flats and fillers when they are new is about 3½ pounds?

A. That is provided in our regulations that that was the way we weighed, and that was the way the Department of Agriculture weighed eggs, by deducting 3½ pounds as tare weight.

Q. The fact is that second hand flats and fillers do not weigh 3½ pounds do they?

A. Well, that would depend on whether they had been in storage or not. They may absorb moisture and weigh more than that.

Q. The usual second hand flats and fillers that you find in use during this period of time when they were difficult to get, the second-hand flats and fillers did not weigh as much as the new ones, did they?

A. I would not make that statement, because

some of those became contaminated with adherent material which increased the weight, processing oil included. [4123]

Q. Now, what is the weight of a medium egg?

A. Of an individual medium egg?

Q. Yes.

A. The Department of Agriculture reported that that weighed not less than at the rate of 20 ounces to the dozen. That is the way we proceeded. That amounts to, I believe, around 1.66 ounces per egg.

Q. On the form that you have, on the reverse side of that there is a direction there, is there not?

A. It is not a direction.

Q. Major——

A. This is Army regulation. The back side of this sheet has nothing to do with the information placed on the front side.

Q. I just say that on the reverse side there is a direction for checking scales and testing weights of eggs, is there not? A. Yes, for the Army.

Q. I mean, I just want to identify the fact that there is a provision on this sheet of paper. That is correct? A. That is correct.

Q. And when you set your scale for the individual weights of eggs, for Medium eggs, you set your scale at 1.66, do you not?

A. No. The scale is set so the weight may or may not be Medium egg weight. It provides the information that if an inspector wants to check your scale and see if it is accurate, that the test weight should weigh 1.66.

Q. So that in the normal packing of eggs, you

have seen [1424] eggs packed and candled in a plant? A. Yes.

Q. You know it to be the fact that the method is for the candler to take the egg and if it breaks the scale for a Medium egg set at 1.66 they will put that egg in the Medium grade?

A. That is the customary practice, yes.

Q. Assuming that every egg had been weighed and broke the scale at 1.66, what would the total weight of a case of eggs be, of the eggs in that case be?

A. Well, I had that information recorded and multiplied. To do it in my head would be rather difficult. There is no provision for accepting eggs on that basis, however.

Q. I did not ask you that. I said, what will the weight of the eggs in the case be where the candler has weighed each egg according to the schedule or the factor 1.66, what will the weight of the eggs be?

A. May I have a pencil and a piece of paper? I have calculated that previously. I believe I have a note in my folder.

Q. Maybe if I give you the figure you may remember it.

Q. Have you got the calculation?

A. Yes, I have determined——

Q. Just a moment. That calculation you made was made since yesterday, was it not?

A. That is correct.

Q. After I called your attention in court to the fact of the 1.66?

A. You, as I recall, never made a mention of 1.66 to me. [4125]

Q. It was at a meeting of the men on the Government side of the table, and that 1.66 was called to your attention, and you made your mathematical calculation? A. I made it since that time.

Q. The answer is 37 pounds .3 of an ounce.

A. I determined it to be 37 pounds 4 ounces at the rate of 22 ounces per dozen, but, as I say, that does not apply to a case of eggs in any respect.

Q. How long has the weight of eggs, that is, Medium eggs, been 40 pounds to the case?

A. Well, since the promulgation of the department standards, at least beyond that my memory wouldn't be accurate. I know the last issue which was dated July, 1942, I think, provided for that.

Q. Well, was the weight of Medium eggs under the rules of the Department of Agriculture 37½ pounds?

A. To the best of my knowledge they never were. They may have been prior to my contact with the egg industry.

Q. When did the Department of Agriculture commence the weighing of eggs, as distinguished from the weighing of individual eggs as part of their inspection?

A. Beyond the date of my memory; I don't know.

Q. Isn't is a fact, Major, that in the inspection of eggs, as well as in the candling, that the determination of weight by the Department of Agricul-

ture was predicated [4126] upon individual egg weights until the early part of 1945?

A. It was not, not before 1945. It was based on a case weight of eggs, as well as individual egg weights in December, 1942, was the date of this.

Q. Is it not a fact that even though there was a rule or a regulation in effect relating to the method of determining weights that the matter of determining weight of cases did not commence until the early part of 1945?

A. Of determining the weight?

Q. Yes.

A. Of the case before 1945? As I say, my knowledge started at the time the order was issued.

Q. Have you observed the Department of Agriculture weighing individual cases of eggs in the normal course of inspecting eggs in the years prior to 1945?

A. I do not recall having inspected eggs in the presence of the Department of Agriculture inspectors in which they weighed any eggs; for the Army we were obligated to, under regulations on the basis of the Department of Agriculture instructions.

Q. That case of eggs on the Cape Charles weighed, according to your calculation, 39 pounds 8 ounces. That is correct, is it not?

A. That is correct.

Q. You made it 43 pounds and take 3½ pounds off and reach an answer of 39 pounds 8 ounces?

A. Correct.

Q. That was on the assumption that your flats and fillers [4127] actually weighed 3½ pounds?

A. Well, no, that was not the assumption. It was based on a directive for the method of determining case weight of eggs.

Q. You followed that direction that told you to weigh cases by weighing half a case and deducting 31½ pounds from the total? A. Yes.

Q. That would be eight ounces under the weight of 40 pounds, the 40-pound weight, isn't that correct? A. Correct.

Q. It would be almost two and a half pounds over the weight required for individual eggs, isn't that correct?

A. If they were all the medium size for individual eggs.

Q. Yes.

A. There is no record outside of my calculation that that is what it would be.

Q. You weighed another case without inspecting it, on the Cape Charles?

A. That is correct.

Q. You found the weight of that to be 40 pounds 4 ounces? A. That is correct.

Q. How many cases of stamped eggs were there on the Cape Charles? A. There were 31.

Q. How many? A. 31, I believe.

Q. 31. The average weight of those two cases, I think, would be off the 40 pounds how much?

A. About two ounces, as I estimate it.

Q. Do you think, Major, that having in mind that you had 31 cases there, that those figures correctly portray the [4128] weight of the lot of eggs

that were stamped by the Department of Agriculture?

A. Well, I have no way of considering it in any other light than that these were a portion of my sample lot, which, after all, is my assumption of the whole lot.

Q. Well, now, Major Evans, assume, if you will, that you were determining the weight of these eggs with the though in mind by you to accept them or not, and the eggs had been tendered you and you found one case would be eight ounces under and the next case four ounces over. You would weigh the entire lot before you would send them back, wouldn't you?

A. I would weigh more cases that I did.

Q. In other words, all that was required in the next case to bring it up to the fulfillment of 40 pounds to the case would have been for the next case to weigh 40 pounds and 2 ounces, isn't that correct?

A. Well, that seems hypothetical in view of the fact that I have three other case; I could determine it.

Q. Major——

Mr. Hippeli: Let him answer.

Mr. Faulkner: Major——

Mr. Pratt: Let him complete the answer.

The Court: Do you wish to complete your answer?

A. Well, I just stated that adds another case to sometjng I don't have here. It is kind of hard to give an [4129] answer to that.

Q. That's right, so you can't give an answer as you sit there now as a witness, that the 31 cases of eggs that were received with the Department of Agriculture stamp wouldn't average 40 pounds to the case, can you?

A. I could not testify to what I had not actually weighed, myself. [4129-a]

(The following excerpts from the redirect examination of the testimony of Major Evans were read:)

"Q. In regard to the Cape Charles, in cross-examination you testified, I believe, that the Number 4 case which you examined, which was a stamped case, graded A and was in weight 39 pounds and 8 ounces, which was just very slightly below the Medium egg in size and weight, is that right?

"A. I believe so.

"Q. Now, I hand you a certificate referring to the other three cases. What was the weight of those several cases?

"A. The first one was 34 pounds, 14 ounces, the second one was 33 pounds, 4 ounces, the third one was 33 pounds, 10 ounces.

"Q. Two of those cases contained Peewee eggs and the other one just barely above the Peewee, or rather, just barely within the Small classification, is that right? A. That is correct.

"Q. And the weight of the other three cases was what?

"A. As distinguished from the average for the four?

"Q. Yes.

"A. Well, the first one outside of the Inedibles, would also have been a Grade B. And the third one would have been slightly under Grade A; it would have been Grade B.

"Q. The whole lot of eggs determined by the candling or [4130] inspection of the four cases was what?

"A. Would have been a Consumer Grade B Small.

"Q. United States Consumer Grade B Small?

"A. Yes, sir.

"Q. Now, referring to Exhibit 98, which I hand you, which is a copy of the invoice of the eggs that went onto the Cape Charles, will you examine the third item, which reads "36 cases of eggs, Medium, Processed, AA," and I will ask you if the eggs which you examined on the ship complied with the description of eggs in the invoice of Nye & Nissen?

"The Witness: They would not fit that description as I found them at the time I inspected them, no, sir.

"Q. How many grades, so far as quality is concerned, were those eggs that you examined, deficient in contrast or comparison with the eggs described in that invoice?

"A. Two letter grades so far as the requirements of the Department of Agriculture for U. S. Consumer grades of eggs are concerned.

"Q. Directing your attention to the fact that these eggs in the invoice are described as Medium, you found them to be what?

"A. I found them to average a Small class rather than a Medium.

"Q. And to what extent were they smaller than the Mediums described in the invoice? [4131]

"A. They would have been 3 pounds, 15 ounces on the average lighter than the requirements for Medium sized eggs.

"Q. Directing your attention to the fact that the stamp on such cases as were stamped on the Cape Charles bore the date April 27, and that your examination was on April 29, two days later; from your experience and knowledge as an expert could the eggs which you examined have deteriorated in two days from AA Medium to B Small?

"A. If the eggs were handled properly it would not be expected that they would drop two grades in two days. It would depend entirely on the circumstances.

"Q. Could they have dropped in weight? Had you finished your answer?

"A. Essentially so, yes, sir.

"Q. Could they have dropped in weight in a period of two days?

"A. Those cases with the Peewee eggs in certainly could not have shrunk over any period of time in size. That is, the size was predetermined at the time the egg was laid. The small amount of shrinkage as determined in individual cases of Medium eggs under unusual circumstances of wind, hot weather and the like, is conceivable. A case of eggs could shrink a matter of a very few ounces

over a short time, but not to the extent as indicated here."

(The following excerpts were read from the the recross-examination [1432] of the testimony of Major Evans:)

"Q. Major, you testified at the beginning of your redirect examination this morning in respect to the Cape Charles. In that particular ship you testified on your redirect examination that the eggs involved in the shipment did not meet the description in a purchase order that provided for the delivery of 36 cases of Medium Processed AA eggs, is that right.

A. I only testified as to the invoice, not the purchase orders.

"Q. I am using the delivery tag. I haven't the invoice. But the quantity was 36 cases of eggs, Medium, Processed, AA; that was the description that you said those eggs did not meet, is that right?

"A. Yes, sir.

"Q. I will ask you, Major, if in your opinion as an expert the case of eggs marked with the Department of Agriculture stamp met the description in the invoice.

"A. They did not.

"Q. Why?

"A. Because the one case that I examined that had that stamp on it had 73 percent Grade AA; the Department of Agriculture requires that they have 80 percent AA eggs, 10 percent A, et cetera.

"Q. You testified on your cross-examination that the Army would accept those eggs as AA's at the point of origin, did you not?

"A. No, sir, that is not what I said. [4133]

"Q. Doesn't your record show that in the case of eggs stamped AA that there were 84 percent A eggs? A. They do.

"Q. There were no inedibles?

"A. There were not.

"Q. The average weight of that case and the next one was within a few ounces of 40 pounds, wasn't it?

"A. Slightly under, the average of those two.

"Q. How much under?

"A. I think the record would show the calculation. I think it would be around 39 pounds 14 ounces.

"Q. The description in the invoice was Medium, AA eggs, and is it your testimony that eggs with 84 percent at the point of delivery weighing within an ounce or so of forty pounds do not meet the description of medium AA eggs at the point of origin? A. They do not.

"Q. Is that your testimony? Why do they not?

"A. Because to be a medium Grade AA they must be 80 percent AA or better.

"Q. What were they three days before?

"A. I do not know. I would have to see the eggs three days before.

"Q. So that you do not know from your examination on that waterfront what the condition of

those particular eggs were three days before, do you?" A. I do not.

"Q. Then you do not know that three days before, or two days, whatever the difference in the date is, what the [4134] quality of those eggs were two days before, do you?

"A. Not of these specific eggs. All I would have would be my opinion in the experience of handling eggs, and how much they would drop.

"Q. Your opinion would be what?

"A. I wouldn't know what they were two days before, not having seen the eggs two days before; I couldn't testify what they were.

"Q. The basis of your testimony would involve in reality whether or not seven eggs out of a hundred had in the period of a couple of days under conditions with which you have no knowledge, had deteriorated in quality from an AA egg, is that right?

"A. If I had to determine that on the basis of one case, your statement would be true. But I had four case on which to base my opinion, which made it considerably lower than that, and there was no question in my mind.

"Q. Major, was there any question at all, with respect to the Cape Charles and with respect to each of these ships that you went down to see, that you observed a quantity of eggs aboard those vessels where it was obvious to you that some of the eggs had been marked by the Department of Agriculture and apparently inspected by them, and then

there were eight or ten cases which were not and which were small eggs, different type eggs?

"A. That was very obvious. [1135]"

"Q. That was quite obvious? A. Yes.

"Q. Now, I am talking about the eggs that bore a Department of Agriculture stamp, and you have one there; there were 73 AA eggs in that case and the case weighed 39 pounds, and then you took another case which was stamped and it weighed 40 pounds, 4 ounces. A. Yes, sir.

"Q. I ask you as an expert whether you will testify under oath in this court that two days before those were not AA eggs?

"A. I am unable to answer the question unless I could see the eggs two days before."

Mr. Faulkner: Your Honor will recall that the certificate relating——

The Court: Just a moment.

Mr. Pratt: I object to any statement of Counsel. The statement might be made to the court at the side of the bar, but not in the presence of the Jury.

Mr. Faulkner: Mr. Pratt, all I was going to say is the certificate——

Mr. Pratt: No, no. I object to any statement.

The Court: I am concerned about the request of the Jury. Has the Jury heard all the testimony now they wish covering the subject matter?

Foreman Barton: I think so, your Honor.

A Juror: One of the jurors would like to know

if the inspection of the eggs furnished the War Shipping Administration [4136] were accepted at the point of delivery or point of origin.

The Court: You will have to state your judgment and limit it to the record and the testimony before you as to that. Now, I am concerned about the convenience and comfort of the jurors. It is obvious it will be necessary for the Court to send you to dinner and any request that you wish to make in relation to your convenience or any message that you want to send to your homes, you may take it up with the bailiff who has charge of you. There are two gentlemen whom I have sworn in to take care of the jurors during this period. Is there any further request that the Jury has in mind at this time? Now, you may let the bailiff at the door know when you wish to retire to have dinner and any request that you may make you may make through him. The jurors will retire to deliberate on their verdict.

(The jurors retired from the courtroom at 6:00 p.m. and at 9:32 p.m. returned into court with a verdict of guilty on each of the seven counts as to the defendants Nye & Nissen, Abraham Moncharsh, Henry Eugene Berman, and Ruby Jutland Goddard; and a verdict of not guilty on each of the seven counts as to the defendant Edward Menges.)

The Court: Now, I desire to express my thanks to the jurors for their period of service and their patience here. I want you to know this Court ap-

preciates the pervice that you have performed here, and if there is any juror whom I can [4137] assist in any way in getting home, it is rather a late hour, or if I can in any way be helpful to any juror I shall be glad to see to it that you get your homes. Have you made arrangements, all of you? You may be excused from any further jury duty and in the event you are called in the near future you might indicate the fact that you have extended such long service and if necessary you may appeal to me and I will do my utmost to be of assistance to you. I thank you most sincerely. You may be excused.

The Court: What day for judgment, gentlemen?

Mr. Faulkner: Under the rules, your Honor, the time within which to move for a new trial and the time in which to move for arrest of judgment is within five days or such other time as the Court may indicate. If the Court will indicate the time we will be prepared at that time.

The Court: Tuesday for judgment.

Mr. Faulkner: Tuesday.

The Court: Tuesday.

Mr. Faulkner: Yes, your Honor.

The Court: That will be April 9.

Mr. Faulkner: What is your desire in relation to the defendants?

The Court: The defendants will go into custody under the rule. [4138]

Mr. Faulkner: Under the rule, your Honor, the Court has the power to do either.

The Court: Well, that is the rule of this Court.

Mr. Faulkner: I meant under the new rules.

The Court: What do the new rules indicate?

Mr. Faulkner: It says sentence shall be imposed without unreasonable delay and pending sentence the Court may commit the defendants or continue or alter the bail.

The Court: They are now committed into custody.

[Endorsed]: Filed April 22, 1946. [4138-a]

[Title of District Court and Cause.]

PROCEEDINGS ON JUDGMENT

Tuesday, April 9, 1946

Mr. Faulkner: If your Honor please, at this time the defendants move for a new trial upon the ground set forth in the written motion for new trial.

(Motion argued by Mr. Faulkner.)

The Court: Motion submitted?

Mr. Faulkner: Yes, your Honor.

Mr. Pratt: Yes.

The Court: The motions and each of them will have to be denied.

Mr. Faulkner: Exception, if the Court please. At this time, your Honor, the defendants move in arrest of judgment, and again I call the court's attention to the fact that every issue involved in the motion for arrest of judgment [1*] was presented to the court in consideration of the demurrers in this case, and I would like to supplement that motion orally upon the ground that judgment should be arrested in so far as the defendant Moncharsh is concerned, because of the legal principles involved in that discussion on the motion for a new trial. I submit the matter.

Mr. Pratt: Submitted for the Government.

The Court: The motion in arrest of judgment will have to be denied.

Mr. Faulkner: Exception.

* Page numbering appearing at top of page of original Reporter's Transcript.

Now, if your Honor please, in connection with the imposition of sentence and judgment, I assume that is the next thing. Will your Honor entertain as to all or any of these defendants a motion for probation?

The Court: No. In mitigation of punishment I will give you the widest latitude to make any showing you wish.

Mr. Faulkner: Very well. In connection with the defendants, we start with the defendants Mr. Berman and Mr. Goddard. Your Honor saw those men in court, and you have also seen them on the witness stand. But apart from that your Honor saw them in the courtroom over a period of time, and your Honor has had an experience that goes back many, many years in relation to many people. Those two boys—we will take Mr. Berman. There is a young man. I am not talking about the affection that I have for these men as a result of my relationships with them in this case. I want to speak just as coldly and dispassionately as I can. He has worked all his life. He was a structural steelworker, truck driver; and came to work for the firm of Nye & Nissen driving a truck. Then he became a salesman. I think he was getting $23 or $24 a week. Your Honor is, of course, aware, and so is Mr. Pratt, of the manner in which he became the president of a company. It was not indicative of his importance in that setup. All he was was a man who went out and made deliveries. When he advanced himself to that position he went out and built up a trade in the city sales for this firm.

Part of that time—the record was accurately indicated to your Honor, the relation of that Coast Egg Products testified to here, and I have checked the State Department records—that company was formed substantially in this manner: The firm of Nye & Nissen, as you know, was a large company, and the city sales was not an important phase of their business. There were two men, Seidel and another man whose name was mentioned here. They turned over a business, and the firm of Nye & Nissen put in $15,000, and the stock ownership was in relation to $3000 for the business and $15,000, but there was an agreement, in writing that half the profits of that company would go to Seidel and the other two, and Mr. Berman was a man who was their city salesman. That company was operated up to sometime in 1943, and it was operated [3] at a loss. The firm of Nye & Nissen paid all the creditors of that firm, and the only creditor of that firm that was not paid was Nye & Nissen, so that it was wound up and the firm of Nye & Nissen then carried on under the management of Mr. Berman the city sales. Now, he had no more to do, your Honor, with the policies [right or wrong, of the firm of Nye & Nissen, than I have and they are clients of mine because of this case. Now, he is married, and it is true that he is married to a relative of Mr. Monchar[illegible]. His [illegible] Menges or any man of similar type in the [illegible] with their union scale and their overtime, would make more money during this period than Mr. Berman. The highest amount he received of any

time was less than $350 a month. That was his full and complete salary, and it commenced I think, during the early part of this at something like $24 a week, and then later he got to the position where he was getting $50 a week, and up to $350 a month. There were no bonuses to him. It was a payment the same as you would pay anyone. He was a hard working man. Those men would go to work—they would leave their houses at 6:30 in the morning, be at that plant at 7:00, and they would devote themselves until late hours of the day and the early hours of the evening, trying to fill orders, and at a time when everyone was short-handed. He has no financial interest in the firm of Nye & Nissen. He has nothing to do with their policies [4] or directions. He is a man who has nothing in life except a wife, one boy, a year old, and one boy nine years old. And none of the elements of profit, if there was profit here,—and you have seen it exaggerated so terribly throughout this trial and in the newspapers—I assure your Honor I have talked to him and have talked to the people in Nye & Nissen, examined the record—I had them in my pocket but I did not bring them out—he had no profit, not a five-cent piece. He never got a dollar out of that company that he did not work long, long hours for, and I assure your Honor that that is the truth.

Now, his family connections speak for sympathy. There is a young man, married, two children, no wealth, no profit, and a life of hard work from the time that he was a very, very young man.

Mr. Goddard is 43 years old. He has worked

there for a long time. He has no interest in that company. He hasn't a five-cent piece invested, and has received not a dollar from that company except wages that may be $40 a week on an average higher than Mr. Menges, the egg carrier. Mr. Menges makes $75 to $85 a week. Mr. Goddard's salary would range from $52.50 a week up to a time when I think he got $90. He has nothing. He has a wife, he has a four-year-old boy, and he has an eight-year-old boy. I do not think you would find a harder working man than that boy. [5]

I am sorry, your Honor, but I can't help it.

The Court: I can understand the situation. I have seen so much of what has gone on before that I am not at all surprised. Nothing unusual about it, at all.

Mr. Faulkner: Now, Mr. Moncharsh was the head of that company. He has worked since he was 10 years old to support a family. The firm of Baum & Moncharsh, in New York, a firm that his father was in. His father died, his brothers died. He worked until he was around 20. He went into the Army, served two years overseas during the first World War. He came back, and as the members of that family gradually died off, he took the responsibility of all of them. He is 51 years of age. He has worked his complete lifetime from the time he was 10 years old. No education. Kind to his family. He has a wife. He has, I think it is, three children. He has grandchildren. Two of his daughters are married, and I think that one of them is a young girl about fifteen years of age.

Now, the three men have led a good life until this moment, and the only question is what relation a man's good deeds have to the time when he has to face punishment for a misdeed. I would like to add one thing for Mr. Moncharsh. He asked me to tell your Honor rather than to address you personally——

The Court: I would suggest that we take a recess for a few minutes. [6]

(Recess.)

Mr. Faulkner: I was about to state to the court in respect to Mr. Moncharsh that he asked me to tell your Honor that whatever punishment there should be in this case in respect to those three men, that he felt that it should go on his shoulders.

Mr. Pratt: If the Court please, I quite agree with Mr. Faulkner in one respect. There is a vast difference in the view of the Government as to the culpability of the defendant Moncharsh and of Berman and Goddard. The evidence discloses here very clearly that Moncharsh was the head of this organization. He was its president. He reaped the benefit of whatever profits accrued, he and the corporation, and the evidence in the case amply shows that the defendant Moncharsh corrupted everybody that came within his organization. He corrupted the employees, the girl candlers; he corrupted the employees on the floor; and he corrupted these young men who stand here convicted with him. His culpability, of course, is greater than that of the others. Nevertheless, these men were the willing tools of Moncharsh. They became a part and

parcel of the fraud that was perpetrated by him, and while there is a difference in the degree of culpability, nevertheless there is no justification and no excuse for their having participated knowingly in these numerous frauds on the Government. And that is all that I have to say in connection with the difference [7] among these three defendants. I would like to suggest at this time, if the Court please, that in this long, long trial the costs that have accrued are very heavy. I can't even estimate the amount of costs, of clerk's costs and marshal's costs, witness fees, and expenses, but it seems to me that they should be assessed against these defendants in connection with the court's judgment. I feel a hesitancy in suggesting anything in connection with the court's functions as to the character of the sentence, and, of course, I do not, except as to this matter of costs; the authorities are ample as to the court's authority to assess costs. The statute gives the court the power, a statute that has been on the books for many, many years, and the new rules which just went into effect by implication have the same suggestion that the court made —of course, it is a matter of discretion—assess costs against the defendants in addition to whatever other punishment the court deems proper. So I very respectfully suggest that in the imposition of sentence there be included the assessment of costs in the case. Further than that, of course, it would be entirely improper for the Government to suggest anything to your Honor on the subject of sentence.

The Court: Is the matter submitted?

Mr. Faulkner: Yes.

The Court: Are you ready for judgment? [8]

Mr. Faulkner: Yes.

The Court: It is ordered that Nye & Nissen, a corporation, pay a fine to the United States in the sum of $5000 on each of seven counts, making a total sum of $35,000.

It is ordered that the defendant Abraham Moncharsh is hereby committed to the custody of the Attorney General, or his authorized representative for imprisonment for a period of two years and pay a fine to the United States in the sum of $5000 on the first count; that he be committed for a period of five years and pay a fine to the United States in the sum of $5000 on each of the counts, 2 to 7, inclusive, the terms of imprisonment to run concurrently, making a total fine on those counts the sum of $35,000.

It is ordered that the defendant Henry Eugene Berman is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for one year and pay a fine to the United States of $100 on each count, 1 to 7, inclusive, the terms of imprisonment to run concurrently.

It is ordered that the defendant Ruby Jutland Goddard is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of one year and pay a fine to the United States in the sum of $100 on

each of the counts 1 to 7, inclusive, the terms of imprisonment to run concurrently.

It is further ordered that the defendants be further [9] imprisoned until the payment of said fines, or until they are otherwise discharged, as provided by law.

Mr. Faulkner: Will your Honor indulge me just a moment? While Mr. Zirpoli is talking in connection with Mr. Moncharsh, the sentence on the first count was two years, and five years on the other counts, and the jail sentences were to run concurrently, but the fine was to run for each count, am I correct in that?

The Court: Yes.

Mr. Faulkner: So that the complete sentence is five years and $35,000?

The Court: The total fine is $70,000.

Mr. Faulkner: I mean Mr. Moncharsh $5000 on each count, $35,000?

The Court: Yes.

Mr. Faulkner: And running the sentences concurrently meant five years?

The Court: Yes, on each of the counts, a fine of $5000 on each, which makes $35,000.

Mr. Faulkner: That was Nye & Nissen and Mr. Moncharsh.

Your Honor, in connection with the sentencing of Mr. Berman and Mr. Goddard, we would prefer if that was a year and a day in the Federal Penitentiary instead of the one year.

The Court: What is your thought on that?

Mr. Zirpoli: If your Honor will excuse me—— [19]

The Court: Yes.

Mr. Zirpoli: I had a very definite thought on it, and my thought was in the interest of the defendants frankly. A year sentence, in view of the fact that they run concurrently, might mean a year in the County Jail, while a year and a day means a sentence in a penitentiary. As far as the stigma of the offense is concerned, I do not think it makes any difference whether the sentence be to the County Jail or to the penitentiary, but they have an opportunity with a year and a day to get what is known as earned good time credits, which would reduce their sentence. They also, if they prove to be exemplar prisoners, are entitled to consideration for parole, and would be able to qualify and make application therefor, and it is because of those considerations that they express the desire that if the court is desirous of doing so, to have the sentence be a sentence of a year and a day to run concurrently.

The Court: Very well. Let the sentence, at the request of counsel for the defendants, be made a year and a day.

Mr. Zirpoli: Thank you, your Honor.

Mr. Faulkner: Would your Honor indicate bail on appeal in this case so we may consider the matter?

The Court: I think you got in difficulties in relation to these matters, and will set the case down for a day certain. It will be next Friday, so both

sides may be fully advised [11] and advise the court at that time.

Mr. Faulkner: On the matter of bail?

The Court: Yes.

Mr. Faulkner: And the defendants will be permitted to remain here, naturally, until that is determined?

The Court: Yes.

Mr. Faulkner: Next Friday morning at ten o'clock. [12]

Friday, April 12, 1946, 10:00 o'clock a. m.

The Clerk: U. S. v. Nye & Nissen, Moncharsh, Berman and Goddard, Motion for bail pending appeal.

The Court: Proceed.

Mr. Faulkner: Your Honor was going to indicate your thoughts on the matter of bail in the event of an appeal. Your Honor put the matter over for that purpose. I think, your Honor, in the event of the defendant's appealing this case, the Government should be fully protected and have no resistance or objection from me. In other words, whatever your Honor thinks is the sound manner in which to proceed, we will abide by that.

There is a $35,000 fine against Mr. Moncharsh and a $35,000 fine against the corporation, and there is the bail for the personal appearance of the defendants. Of course, your Honor has imposed a sentence, but what I am about to say to your Honor, and I don't want you to think I am pressing

the court all the time, but I have certain convictions in relation to the conviction of the defendants on the conspiracy counts, and I have certain views about the conviction of Mr. Moncharsh on the substantive counts.

The unfortunate position that I am in is this, your Honor: I have furnished authorities in law to support a position before your Honor, and I have never heard any statements from the counsel for the Government that I am wrong in the motion, [13] whether it is possible in this record to sustain the conviction of Mr. Moncharsh on that count.

Your Honor passed upon that, upon the matter of the motions for new trial, at which time I read you that case. The only other authority contrary to that has ever appeared in this case was the case where the president of a company, manufacturing an article which he claimed had cream in it, or butter fat—that was the sole business they did—they manufactured an article which was illegal in every single article that was sold. I think, while this has been a long case, and Mr. Pratt worked hard, and I have worked hard, and your Honor has worked hard, and where there has been a determination by a jury, I know the handicaps that we undergo on appeal, but I wonder if your Honor would consider at this time this thought—and I am not talking about the money.

In other words, I would not talk about the fines, but would your Honor consider again at this time the matter of the prison sentence being at the level of the conspiracy count, and the case can end right

here for every purpose? Your Honor can realize, when you analyze the situation, the benefits that come to a man from good behavior in a penitentiary. I think there is a benefit to all concerned if that were done. In other words, the Moncharsh family and the ramifications of the other thing is all over. The man goes to jail and comes out and starts a new life. That extra burden, that he [14] has to serve during the three years is the thing that bothers me. I don't think I can be wrong on the proposition of his conviction on the substantive count, and if Mr. Pratt did not object too strenuously, I would leave the whole case finished at this level, which would be the determination of a hard-fought case with many problems involved.

I think your Honor will agree with me that right from the word go, if the court took—and it properly could have taken—an opposite legal position in respect to this testimony, the Government would have no case at all. The testimony of Pineda, the admissibility of the testimony of those men after delivery, they have the benefit of all that. They have the conviction they had a purpose in mind. There is severe punishment in the penitentiary, and there is a severe punishment in the way of money, and it would be a great satisfaction to me, and I think more good would come to more people if we did that way.

I don't know how Mr. Pratt reacts to that.

Mr. Pratt: If the Court please, I fully disagree with Mr. Faulkner in connection with the responsibility of the defendant Moncharsh in connection

with the substantive counts. The evidence is overwhelming to show those violations of law. The evidence is overwhelming to show that Monchursh was the head of this corporation. He dictated its policies and he knew what was going on. Mr. Faulkner has cited to your Honor, in particular, the Saul case, which to my mind thoroughly sustains the Government's position. In that case the court [15] points out that the responsibilities of the officer of the corporation may be established by substantial evidence, and in that case the Circuit Court of Appeals sustained the conviction, because of the circumstances in evidence showing the responsibility of this officer. We could rely upon the case which Mr. Faulkner cites in that connection, but aside from that those questions have been determined by the court, and what a scandal it would be, what an outrage it would be, if this man who has committed a series of offenses over a period of years should escape with a two-year sentence. It would be terrible. The sentence imposed by the court is a very light one, and this defendant should certainly be required to suffer the imprisonment that has been imposed.

So far as bond on appeal is concerned, the Government opposes the fixing of any bond on the appeal. The Government believes that both should be denied on appeal in accordance with the rule laid down by the Supreme Court.

Just to direct your Honor's attention to these rules, with which I know the court is familiar, but just again to call your Honor's attention to them, in

the first place Rule 38, of the New Rules of Criminal Procedure, subsection (b):

"Admission to bail upon appeal or certiorari shall be provided in these rules," and then there is rule 46:

"Rule 46, Paragraph 2: Upon review, bail may be allowed pending appeal or certiorari, only if it appears [16] that the case involves a substantial question which should be determined by the appellate court."

Now, this Rule 46 is adopted by authority of the Act of February 24, 1933. The rule is substantially the same as Rule 6 of the Rules of Practice and Procedure after plea of guilty, and so forth, in criminal cases, promulgation by the Supreme Court of many years ago, and that Rule 6 is this:

"Bail: A defendant shall not be admitted to bail pending an appeal from a judgment of conviction, save as follows:

"Bail may be granted by the trial judge, or by the appellate court," and so forth, and following that:

"Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court."

Now, this case went on for all these weeks, and in my judgment there is no substantial question for review by the circuit court of appeals. I feel confident that if this court had felt there was substantial error in this record, the motion for a new trial would have been granted. It was overruled.

There is no error in this record of any substantial amount—nothing that affects the substantial rights of the defendant, and in my judgment this court has no alternative but to deny bail.

There are so many instances that we see all the time of [17] defendants who have been convicted of important offenses, and then they are on the street for months and months, and sometimes for years, until finally there is an affirmance of judgment, and finally they go to imprisonment. I think, in the judgment of the public, generally, situations of that sort amount almost to public scandal, and for this man, who has been convicted of these offenses, to be at large during all this period while an appeal is pending, I don't think is proper, in view of the proper administration of law in criminal cases, and I urgently suggest to the court that bail be denied.

Mr. Faulkner: Those rules of criminal procedure have been in existence for fifteen years. The only time bail was ever denied was the other day in an OPA case where Mr. Hatfield put on proof that the man was going to escape.

Mr. Prate says the record shows abundantly the participation of Mr. Moncharsh in the substantial offenses. They are all isolated and they are all within ten days, in an eight year period, and not a false claim before, nor a false claim after. I don't see how, and I have never heard a case, or have seen a text write it, and I have read the statute, and you have to distinguish between the language of the aiding and abetting and the con-

spiracy statute. In this case I read, this man was the proprietor of the still; and they found him going into one house, and said he was conspiring in there. [18] They found him going into a second house, and said he was conspiring there, and they did not find him in the third house, and the court reversed the judgment. Your Honor knows that case.

The Court: What about these other two defendants?

Mr. Faulkner: I am not speaking officially. I am quite satisfied from their indications to me they are not going to appeal.

Mr. Pratt: If that is the case, that makes it more emphatically proper that Moncharsh should not be admitted to bail. If these two men who were clearly subordinates and clearly under his control are to abandon any thought of an appeal and are now to go to the penitentiary, what an outrage it would be that Moncharsh should be free during any period of time while his subordinates, his tools, are in the penitentiary. I think it would be a disgrace and an outrage to have that situation arise.

Mr. Faulkner: In all likelihood, long before this case was determined, they could have served the time your Honor has imposed.

Mr. Pratt: The fact that they abandon appeal amounts on the whole to a confession of guilt on their part, with Moncharsh, if bail is allowed, on the street.

Mr. Faulkner: I don't want to get into a row

with Mr. Pratt, but there is no sense to remarks like that. [19]

The Court: Is the matter submitted, gentlemen?

Mr. Faulkner: Yes.

The Court: As the case now stands submitted, bail will have to be denied. I might add to that, there has been no substantial question presented to the court that would justify the court in giving bail in this case. I have tried the case for days and weeks, and have had an opportunity to observe all of the witnesses, and allow the widest latitude to their presentation of any question of law or fact, and under the cases, as I have indicated, it would be a mockery of justice to see two men walk to the penitentiary in the next few days because a man who was president of the corporation, and because he happens to be in a position financially to do the things that have been indicated here, why, it should not be misunderstood by anyone.

Mr. Faulkner: May I interrupt your Honor?

The Court: Yes.

Mr. Faulkner: Mr. Goddard and Mr. Berman, who are the other two men, in connection with their appeals, if they desire to appeal, in fixing the bail, your Honor, as far as the stay of execution of Mr. Moncharsh is concerned, I don't even think we would ever put up bail for that.

The Court: I may further indicate that, and it is always uppermost in my mind, if this was the finality, I might seriously consider the future and give it future thought, [20] but if these defendants are entitled to bail, the appellate court can be

applied to and you would have your remedy there. I have heard all of the testimony in this case, as I have indicated, and in conscience or under the law these defendants are not entitled to bail.

Mr. Faulkner: I think your Honor's position is such because I gave your Honor a truthful statement about Mr. Berman and Mr. Goddard.

The Court: I may state, so that there is no mistake about that, under the cases as presented, bail will be denied all three defendants without reservation, so that you need not be at a loss to know the statement did not influence me, but it had to be considered, but I can say to you now, that I deny bail for the three defendants in the event of appeal.

Mr. Faulkner: What order will your Honor make with reference to the stay of execution on the fines?

The Court: I think the defendant should be brought into court and there should be an examination with relation to his assets.

Mr. Faulkner: Your Honor does not have to do that. Any appropriate order your Honor makes, we will abide by it.

The Court: What is the Government's position?

Mr. Pratt: You refer to supersedeas bond?

Mr. Faulkner: Yes.

Mr. Pratt: Of course, the matter of bail relates only to [24] the appearance of the defendants and unless there is a supersedeas bond, the Government would be required in the ordinary course of the duties of Government counsel to proceed at once

to attempt to collect these fines. We suggest supersedeas bonds in double the amount of the judgment.

Mr. Faulkner: I never heard of such a thing. It is absurd, Mr. Pratt. I don't understand your position. I can deposit the money in the registry of the court.

Mr. Pratt: That certainly would be sufficient.

Mr. Faulkner: But you want double the amount.

Mr. Pratt: No, I don't want double the amount.

Mr. Faulkner: Whatever the court thinks is fair will be complied with.

Mr. Pratt: I don't want to suggest anything unreasonable. The only thing I want to do is whatever is necessary to secure for the Government the payment of these fines. A bond ordinarily is required in double the amount that is involved. In this instance, of course, if cash were to be deposited in the registry of the court, the only amount of cash that would be necessary would be the amount involved, but when it comes to a bond, rather than cash, all I want to suggest is the ordinary custom and practice be followed. I have assumed that it is customary to require a bond in double the amount, whether or not it is a civil or a criminal case. If I am not mistaken about that, that is the fact. Of course, it is a [22] matter for the court's judgment, rather than, even, my suggestion. I don't know what the prevailing custom here is in this district.

Mr. Faulkner: My recollection is, your Honor, for many years a supersedeas bond was ordinarily a $250 one, where there was a jail sentence and a

fine, but the rules were changed, I think, somewhere around 1940. But up to that time, where a sentence of imprisonment was imposed, and also a fine, the appeal with the supersedeas bond stayed the execution. In 1940 we became conscious of the rules, and the rule now is that the court may make whatever appropriate order it desires in order to stay the execution of the fine.

Mr. Pratt: A $250 bond is not going to secure the payment of $35,000.

Mr. Faulkner: If the Court had any idea I was indicating that, I did not make myself clear. We have $70,000. Whatever your Honor wants us to do, we will do. I assure your Honor the fines are going to be paid in the event this judgment is affirmed, or in the event of another attorney.

The Court: Is the matter submitted?

Mr. Faulkner: Yes.

The Court: Since, under the new rules, you might deposit the cash in the clerk's office, you have that opportunity. In the event that is not done, the bond will be double.

Mr. Faulkner: Not a surety?

The Court: A surety bond.

Mr. Faulkner: In double the amount?

The Court: In double the amount.

Mr. Faulkner: Your Honor, when the surety company qualifies, it will only secure the bond and they are protected [illegible] to have the alternative of putting up the bond.

The Court: You have the alternative of putting up the bond or putting up the cash.

Mr. Faulkner: That is what I think we will do, but I think we should have the alternative. To ask us to put up the $140,000 to stay the execution when there is a surety bond in a personal bond, that would be proper, but to deprive us of the alternative of securing a surety bond, your Honor is putting a burden that is unjust on the defendants, and of no benefit to the Government. There is not a surety company that does business here that has not been passed by the United States Government, and if they put up the bond it is as good as money.

The Court: Not always; bonding companies challenge many of these matters.

Mr. Faulkner: I have never know them to.

The Court: I have, right in this court.

Mr. Faulkner: It seems to me to ask $140,000, your Honor knows the method of writing them——

The Court: I do. In this case I made the order. You may pay to the registry, into the clerk's office, the fine imposed. In the event of bond being put up, it will be double the amount.

Mr. Faulkner: May I have the precise order that the money may be deposited in the registry of the court, or bond in twice the amount?

The Court: Yes, that is it.

Mr. Faulkner: In that order, may we put up personal bonds?

The Court: You may make any showing you wish on personal bonds. It depends entirely on the showing made.

Mr. Faulkner: I understand that, but we would

be given that privilege of putting up the surety bond or personal bond?

The Court: Yes, after hearing.

Mr. Faulkner: In connection with depositing the money with the clerk, may we have fifteen days to accomplish that?

Do you have any objection?

Mr. Pratt: I would not have any objection to that.

The Court: 15 days. The clerk calls my attention to the fact that possibly it would be better to draw up an order, so we can enter it. You will prepare the order.

Mr. Faulkner: Yes, your Honor.

The Court: You might accompany him upstairs, so there [25] will be no question about it.

Mr. Faulkner: May we have an exception to those rulings?

The Court: You may.

[Endorsed]: Filed May 25, 1946. [26]

[Endorsed]: No. 11308. United States Circuit Court of Appeals for the Ninth Circuit. Nye and Nissen, a Corporation and Abraham Monchartsh, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 31, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 11308

NYE AND NISSEN, a corporation, and ABRAHAM MONCHARSH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION DISPENSING WITH PRINTING OF ORIGINAL EXHIBITS

Whereas, the exhibits essential to a proper consideration of this appeal have been read into the transcript of testimony which will became a part

of the printed transcript of record on appeal in this cause; and

Whereas, such exhibits which have not been so read into the transcript of testimony in all probability will not be essential to the consideration of this appeal; and

Whereas, should any exhibit not so included become essential on the consideration of this appeal, the same will be set forth in an appendix to the briefs filed in this appeal;

Now, Therefore, it is hereby stipulated by and between counsel for appellants and counsel for appellee that the original exhibits to be used on the consideration of this appeal need not be reproduced in the record herein.

Dated: June 7th, 1946.

/s/ JOHN S. PRATT,
/s/ ALDEN F. HOUCK,
/s/ GEORGE W. HIPPELI,
Attorneys for Appellee.

/s/ HAROLD C. FAULKNER,
/s/ A. F. ZIRPOLI,
/s/ WILLIAM M. MALONE,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Appellants.

[Endorsed]: Filed June 7, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER DISPENSING WITH PRINTING OF ORIGINAL EXHIBITS

Upon consideration of the stipulation of counsel for the respective parties hereto that the original exhibits in the above cause need not be printed as a part of the printed transcript of record, but may be considered by this Court in their original form, and good cause appearing therefor;

It Is Ordered that said application be, and hereby is, granted and that the original exhibits in this cause need not be printed as a part of the printed transcript, but may be considered in their original form.

Dated: June 7, 1946.

/s/ FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed June 7, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

(Rule 19)

Come now the Appellants in the above-entitled appeal and present their statement of points on ap-

peal and designate the portions of the record that they consider necessary for the consideration thereof, to-wit:

STATEMENT OF POINTS ON APPEAL:

1. The Indictment.

(a) That the Court erred in overruling the appellants' motion to quash the indictment to which ruling an exception was duly noted.

(b) That the Court erred in overruling the appellants' demurrer to the indictment, to which ruling an exception was duly noted.

(c) That the Court erred to the substantial prejudice of each appellant in denying the demand and motion of appellants for a bill of particulars, to which ruling an exception was duly noted.

2. The evidence.

That the Court committed numerous errors in ruling upon the admissibility of evidence over objections duly made, all of which were highly prejudicial to appellants and which rulings were duly excepted to by them, from and among which but not to the exclusion of all, were the following:

(a) The admission of vast quantities of evidence relating to candling of eggs, grading of eggs, transferring of eggs from one case to another and inspection of eggs, without foundation being laid that any of the acts or transactions related to the filling of orders for government agencies in which inspec-

tion by government agencies was covered and which evidence is further inadmissible on many other grounds stated to the Court at the time of its admission.

(b) The admission of evidence concerning the condition of eggs aboard a vessel, the William S. Clark, given by cooks, other galley workers, various inspectors and other persons, most of which evidence related to the condition of eggs twelve (12) to fifteen (15) days after delivery to said vessel;

(c) The admission in evidence of the testimony of witnesses who had no qualifications to pass upon the quality and condition of eggs aboard a vessel known as the Hawaiian Shipper, which testimony related to the condition of eggs at a time about eight days after their delivery and continuing thereafter for a period of several months, all of which eggs appeared without conflict to have been inspected by the Department of Agriculture prior to delivery, and which eggs were, under the terms of the contract relating to delivery subject to such inspection.

(d) The admission in evidence of testimony relating to deliveries of eggs to various ships between April 24, 1944, and May 15, 1944, the cases of which bore inspection stamps of the Department of Agriculture, without a foundation being laid in this, with the complete failure of proof that the eggs in the cases bearing the stamps of the Department of Agriculture did not contain in truth and fact the eggs actually inspected by said Department on the date covered by its stamps and by grading certificates

issued by it, and without proof of any course of conduct, general or specific, from which an inference might be drawn that at the time of said inspections the appellants or any of them, or persons authorized to act for them, were engaged in or actually did transfer any eggs out of any of the cases stamped by the Department of Agriculture and delivered to these ships.

(e) The admission in evidence of opinions and conclusions of witnesses in respect to the quality, condition and weight of eggs at a time subsequent to their inspection or delivery.

(f) The admission in evidence of testimony relating to transactions during the years 1943 and 1944, without any evidence that a conspiracy, as alleged in the indictment or otherwise, was in existence during the years 1943 and 1944.

(g) The admission in evidence on all counts of testimony relating to particular transactions (e. g. deliveries to specified ships) without in any way connecting said particular transactions with or the laying of a foundation for their application to each of the substantive counts and without the indication of any purpose for such testimony.

(h) The admission in evidence of testimony relating to particular transactions, that is to say, transactions other than those involved in each substantive count (both prior and subsequent thereto) for the purpose of showing intent.

(i) The admission in evidence of testimony cov-

ering an incident relating to the weighing of butter in [illegible] to grain in the Van [illegible] without any foundation being laid that the butter had ever been in the physical possession of any defendant, weighed, packed, weighed or otherwise cut by the defendants or that they had any knowledge of the weight thereof.

(Note: The butter involved in this transaction was Eastern butter and had never been cut in the plant of Nye and Nissen, nor is there any evidence from which an inference might be drawn that it had been so cut.)

(j). The admission in evidence of testimony of and the exhibits introduced in evidence in connection with the testimony of the following named witnesses: Lt. Col. P. Hugh Hand, Henry Foster Pineda, Paul H. Debes, Sture Oscarsson, Thomas Andrew Dolyn, Haffel H. Brown, Oscar Nystrom, Frank Gartenberg, Homer G. Foster, C. A. Wirth, Milton R. Evans, Adam Thomas Andrade, James G. Mahoney, Wilbur J. Mills, H. B. Tillet, G. Wallace Ryneerson, H. W. Bradway, Almo G. Abell, August Hanson, Morain Amundsen, Neldon James Van Winkle, William J. Cochran, Edward Fisher, Floyd Meneimer, Josephine Briant, Mario Valdez, Eleanor McKenna, Juanita Matheson and Violet Higuera.

(k) The admission in evidence of U. S. Exhibit No. 48 on all counts of the indictment without in any wise connecting said exhibit with or the laying of any foundation for its application to the sub-

stantive counts of the indictment, to-wit: Counts Two to Seven, inclusive. (See Page 135 of the Reporter's Transcript of Record.)

(l) The admission in evidence of U. S. Exhibit No. 59 on all counts of the indictment without otherwise connecting said exhibit with or the laying of any foundation for its application to the substantive counts of the indictment, to wit: Counts Two to Seven, inclusive. (See Page 135 of the Reporter's Transcript of Record.)

(m) The permitting of the prosecution to introduce in evidence rebuttal testimony on numerous collateral matters.

(n) The enlarging of the scope of the cross-examination of the witnesses Menges and Monchdrsh by permitting the cross-examination of these witnesses on immaterial transactions with relation to which they gave no testimony whatever on their direct examination.

(o) The permitting of the cross-examination of the witness Menchar [illegible] on collateral and immaterial matters [illegible] alleged effect [illegible] Old Hand by effecting him [illegible] trips to Sonoma, Mission Inn and other similar transactions.

(p) The admission in evidence of the [illegible] hibits 179, 180, 181, 182 and 183.

(q) Permitting the prosecution to introduce rebuttal evidence relating to a purported report of

From Counsellors to Appellants dated November 3 to November 4, 1943.

(7) Permitting evidence to be introduced against Appellants wherein they were required:

(i) To defend against acts and transactions so vague and indefinite as to time and circumstances as to prevent them from having a fair trial.

(ii) To defend against acts and transactions not within the scope of the indictment.

(8) The denying of appellants' written motion for the exclusion of the testimony of the witness, Henry Lester Pineda, on the grounds set forth in Appellants' written motion therefor. (Page 49 of the Clerk's Transcript of Record.)

(9) The denying of appellants' motion to strike the testimony and exhibits introduced in evidence in connection with the testimony of the following named witnesses: Lt. Col. Pearl Hugh Hamel, Paul H. Debes, Stuart Omerson, Thomas Andrew Hodge, James G. Mahaney, Harold H. Brown, William J. Mills, H. B. Tillet, C. A. Wirth, C. Walling Ramsey, H. W. Bradway, Alvin G. Abell, Frank Hartenbower, August Hanson, Morgan Augustsen, Nelson James Van Winkle, William J. Cochran, Ephraim Eugene Nystrom, Milton E. Evans, Elmer Mapelsmer, Josephine Bryant and Adam Thomas Midgade. (For grounds of said Motion to Strike, see Pages 3082 to 3091 of the Reporter's Transcript of Record.)

(d) That the Court erred in its actions and rulings in admitting evidence against these appellants which was neither competent, material or relevant and without laying a foundation therefor and which was hearsay as to appellants and to the introduction of which appellants objected and to which rulings appellants excepted.

3. Misconduct of the Prosecution.

(a) That counsel for the prosecution was guilty of prejudicial misconduct in asking as a concluding question on the cross examination of the Appellant Moncharsh:

"Q. Now you recall, do you not, that you had serious difficulty with the Navy in connection with the supplying of eggs, didn't you? A. No.

"Q. Weren't you debarred for a period of 10 years?"

(b) That counsel for the prosecution was guilty of prejudicial misconduct in prominently displaying before the jury a blue Nye and Nissen carton, having no relation to the case, with the letters "Large" written on it, and extracting therefrom small eggs.

4. Insufficiency of Evidence to Sustain the Verdict.

(a) That there is no evidence to sustain the verdicts on the First, Second, Third, Fourth, Fifth, Sixth and Seventh Counts of the indictment and each thereof.

(b) That the verdicts on the First, Second,

Third, Fourth, Fifth, Sixth and Seventh Counts of the indictment and each thereof are contrary to the weight of evidence.

(c) That the Verdicts on the First, Second, Third, Fourth, Fifth, Sixth and Seventh Counts of the indictment and each thereof are not supported by substantial evidence.

3. Appellants' Motion for Directed Verdict of Acquittal (or Judgment of Acquittal).

(a) That the Court erred in denying each of Appellants' motions made at the close of plaintiffs' case in chief for an order dismissing each count of the indictment against appellants on the grounds specifically stated at the time of the making of said motions as appears from Pages 3091 to 3098, inclusive, of the Reporter's Transcript of Record, to which rulings exceptions were duly noted.

(b) That the Court erred in denying each of appellants' motions made at the close of plaintiffs' case in chief for an order directing a verdict of not guilty on each count of the indictment on the grounds specifically stated at the time of the making of said motions as appears from Pages 3093 to 3098, inclusive, of the Reporter's Transcript of Record to which rulings exceptions were duly noted.

(c) That the Court erred in denying each of appellants' motions made at the close of the whole case for a directed verdict of not guilty (or judgment of acquittal) on each count of the indictment on the grounds specifically stated at the time of the

making of said motions as appears on Page 4073 of the Reporter's Transcript of Record, to which ruling exceptions were duly noted.

6. Variance between Proof Offered and Received and Charge on the First Count.

That there is fatal variance between the proof offered and received and the charge laid in Count One of the indictment in this:

That the indictment relates to a conspiracy continuous in nature, commencing January 1, 1938, and ending at the time of the return of the indictment in June, 1946, the purposes and objects of which were to defraud the United States in grading, weighing, packing, selling and delivering to the United States of America and agencies thereof inferior products through frauds and deceptions practiced upon inspectors, graders and representatives of the Department of Agriculture, War Shipping Administration, War Department and Navy Department, who inspect, weigh, grade and receive butter, eggs and cheese, and to impede and impair the lawful functions of the inspection service and to circumvent and avoid the standards of inspection, grading and weighing and to misrepresent grade, weight and prices of eggs delivered to the War Department and War Shipping Administration and to cut underweight butter to be inspected, graded, weighed by inspectors of the War Department and to conceal this fact from inspection and to misrepresent weights and prices of butter and to

misrepresent weights and grades of cheese, etc. as more fully appear in the indictment,

Whereas, the proof against these defendants consisted of a series of transactions commencing in 1938 and ending in the year 1942, none of which relate to particular deliveries to any Governmental agency nor do they relate to any acts or conduct in respect to transactions with the War Shipping Administration; and all of which purported to relate exclusively to acts and conduct of Appellants and their co-defendants in unidentified transactions with the War Department, which acts if believed relate to methods of handling eggs and butter at the time of inspection at the point of origin, whereas the transactions were such wherein the inspection at the point of delivery determines whether or not the eggs and butter involved are acceptable to the War Department; and

Whereas, in addition to the foregoing, evidence under Count One of the indictment was admitted of acts and transactions in the year 1943 (delivery to the William S. Clark), a series of acts and transactions in 1944 in the months of April and May, and a single transaction in the month of December, 1944, and each and all of which are unrelated to the subject-matter of the proof for the period 1938 to 1942, as aforesaid, and is unrelated in time, place, persons present and circumstances to transactions prior to 1943 and which acts were not and could not and did not have the proofs, objects or effects alleged in the indictment herein,

As a consequence of the said evidence admitted under the First Count the proof, if believed, establishes two separate and independent conspiracies, one of which was not charged and which may have been the basis for the jury's verdict on this Count, thereby resulting in a complete and fatal variance between the charge made and the proof offered.

7. The Instructions Given.

The Court erred to the substantial prejudice of appellants in giving to the jury the following instructions to all of which counsel for appellants duly objected and stated their grounds therefor:

(a) "The evidence in proof of a conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstances must be inconsistent with any other rational conclusion, and inconsistent with the defendant's innocence. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men and women that, even though there is no direct evidence of the actual participation in the alleged offense by the defendant (or defendants), a reasonable inference from all of the facts and circumstances does to your mind, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you

should make the deduction and find accordingly." (Reporter's Transcript of Record, Page 4082.)

(b) "At this time you are instructed that, if you are satisfied beyond a reasonable doubt (1) of the existence of the conspiracy charged, (2) of the participation therein by the defendants, and (3) that such acts were done and declarations were made in furtherance of the conspiracy, you may then consider the testimony relating to such acts and declarations against all of the defendants, even those who were not present when such acts and declarations occurred." (Reporter's Transcript of Record, Page 4083).

(c) "In each of these counts it is charged in substance, that at a specified time and place, the defendants knowingly and wilfully made or used or caused to be made or used a certain false invoice covering a sale and delivery of eggs, butter, or cheese by Nye and Nissen to the United States of America—War Shipping Administration."

"Each of these counts further charges that the invoices in question contained statements and entries which were fraudulent and fictitious in that the eggs, butter, or cheese delivered were of a lower grade, weight, or price than that represented and billed for in the invoice, and that each of the defendants well knew such to be the fact when he made or used the invoice or caused it to be made or used."

(Reporter's Transcript of Record, Pages 4084 and 4085).

(d) "With respect to each of these substantive counts, you are instructed that the invoice in question is included within the general terms 'bill', 'voucher', 'account', 'claim', and 'certificate' as they are used in the statute." (Reporter's Transcript of Record, Page 4085).

(e) "You are further instructed that as a matter of law (1) the War Shipping Administration is an agency of the United States, and (2) the making and using of each of the invoices pleaded in these counts was a matter within the jurisdiction of the War Shipping Administration within the meaning of the statute." (Reporter's Transcript of Record, Pages 4086 to 4087).

(f) "If, with respect to the invoices involved in all or any of the substantive counts, your find beyond a reasonable doubt that such invoice contained material misrepresentations as to the grade, weight, or price of the eggs, butter, or cheese delivered, and that the defendants or any of them wilfully made or used such invoice, or caused it to be made or used, knowing of these material misrepresentations, then you will find such defendant or defendants guilty of the offenses charged in such substantive counts of the indictment." (Reporter's Transcript of Record, Page 4087).

(g) "However, a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of

his own acts." (Reporter's Transcript of Record, Page 4088).

(h) "The determination of a charge in a criminal case involves the proof of two distinct propositions: First, that the crime charged was committed; and, second, that it was committed by the person accused thereof and on trial therefor." (Reporter's Transcript of Record, Page 4089).

(i) "If the jury should find that a particular expert witness possesses the necessary background, training and experience in the subject matter involved in his discussion, then they shall consider his opinion as a matter of evidence which shall be treated in the same light as any fact testified to in the case." (Reporter's Transcript of Record, Page 4094).

(j) "There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit—in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the